Supreme Court, U.S.
FILED

961458 MAR 13 1997

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No. _____

In The

Supreme Court of the United States

October Term, 1996

SIDNEY VERDIN, JAKE BILLIOT, WICKLIFF VERDIN, AUTHOR BILLIOT, ALTON VERDIN, JAY NAQUIN, JOHN VERDIN, JR. AND FOREST BILLIOT, JR.,

Petitioners,

versus

LOUISIANA LAND AND EXPLORATION COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

R. Glen Cater
Jennifer N. Willis
Cater & Willis
3723 Canal Street
New Orleans, LA 70119
Telephone: (504) 488-6300

Joseph L. Waitz
Mary W. Riviere
Waitz & Downer
423 Goode Street
Houma, LA 70361
Telephone: (504) 876-0870

Mack E. Barham
Robert E. Arceneaux*
Julia Symon de Kluiver
Barham & Arceneaux, PLC
650 Poydras Street,
Suite 2700
New Orleans, LA 70130
Telephone: (504) 525-4400

Joel R. Waltzer
Waltzer & Associates
144 Elk Place, Suite 1710
New Orleans, LA 70112
Telephone: (504) 525-1586

Attorneys For Petitioners, Sidney Verdin, et al.

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

HGPP

QUESTION PRESENTED FOR REVIEW

Does a state court have jurisdiction to enter an order of ejectment in a possessory action the defense to which is an assertion of Indian aboriginal title?

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JURISDICTIONAL STATEMENT

This case was filed by Louisiana Land and Exploration Company in Louisiana state court. The Louisiana First Circuit Court of Appeal rendered its decision on September 27, 1996. The petitioners timely filed an application for writs of certiorari to the Louisiana Supreme Court, which was denied by the court on December 13, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1257 and Supreme Court Rule 10, subsections (b) and (c). 28 U.S.C.A. § 1257 (West 1993); Sup. Ct. R. 10.

STATUTES INVOLVED IN THE CASE

28 U.S.C.A. § 1360 (West 1993). *See* 22a.

25 U.S.C.A. § 1322 (West 1983). *See* 23a.

STATEMENT OF THE CASE

Louisiana Land and Exploration Company ("LL&E") filed suit in Louisiana state court seeking a declaration of its possessory rights in certain property that was occupied by petitioners, Sidney Verdin, Jake Billiot, Wickliff Verdin, Author Billiot, Alton Verdin, Jay Naquin, John Verdin, Jr., and Forrest Billiot, Jr., members of the Point au Chien Indian tribe who claim aboriginal title to the land (hereinafter "the Indians"). Following the removal of this matter to the United States District Court for the Eastern District of Louisiana and its subsequent remand to the state court, the Indians raised the defense that they enjoy aboriginal title to the disputed property which supersedes whatever rights are claimed by LL&E. This title arises by virtue of their ancestor's possession of the land prior to the Swamp Land Grants from the United States to the State of Louisiana, LL&E's predecessor in title. The Indians' aboriginal title has never been extinguished by the Federal Government, so it continues to encumber all claims to this property, including LL&E's "right" to possession obtained from the State of Louisiana.[1]

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[1] The Indians' claims of aboriginal title to this land, and all its benefits, are based upon unbroken possession of the land, through their lineal ancestors who comprise an Indian tribe (the Point au Chien Indians) from time immemorial to the present. Subsequent grants of the land by the United States to individuals or to the State of Louisiana, in the absence of an express indication to the contrary, conveyed only a fee subject to the unextinguished aboriginal title held by the Indians. *See Bennett County, S.D. v. United States*, 394 F.2d 8, 11-12 (8th Cir. 1968), citing *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353-5, 62 S.Ct. 248, 255-6, 86 L.Ed. 260 (1941). For a thorough

The Indians then raised the exception of lack of subject matter jurisdiction, contending that the Louisiana state court had no jurisdiction over LL&E's possessory action because it could not resolve the defense raised by the Indians – aboriginal title. The adjudication of this question is reserved exclusively for federal courts, where a declaratory judgment action filed by the Indians against LL&E asserting aboriginal title had already been filed. *See Verdin et al v. Louisiana Land and Exploration Co.*, Docket No. 93-3537, United States District Court, Eastern District of Louisiana. This federal suit was and is still pending, but has been indefinitely stayed **at LL&E's request** under the primary jurisdiction doctrine while the Bureau of Indian Affairs hears a request for official recognition by the United Houma Nation, a large group of Indians who claim the Point au Chien tribe as part of their membership (although the Indians have never claimed that an entity as large and diverse as the United Houma Nation constitutes a tribe, and have never claimed membership in such a "tribe").

The exception of lack of subject matter jurisdiction was denied by the Louisiana State Court on July 17, 1995. *See* 11a-20a. In its reasons for denial, the state court held that it had jurisdiction over LL&E's possessory action because the Indians had not proved that the property at

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discussion of Indian aboriginal rights, see *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), holding that federal subject matter jurisdiction exists under the federal common law to hear a possessory action seeking to vindicate aboriginal title rights.

issue was Indian land. The Indians applied for supervisory writs, which were denied by the Louisiana First Circuit Court of Appeal with the gratuitous statement that it saw "no error." *See* 21a.

After trial on the merits,[2] the state district court entered judgment for LL&E, finding that LL&E had proved its right to be maintained in possession of the property due to its previous and uninterrupted possession of at least one year. The Indians appealed the adverse possessory judgment, reurging as their principal assignment of error the well-settled rule that state courts have no jurisdiction to adjudicate disputes involving property alleged to be Indian lands. However, the Louisiana First Circuit Court of Appeal, without considering the merits, summarily refused to consider this argument, reasoning that its earlier denial of the Indians' application for supervisory review was the equivalent of a ruling that the state court has subject matter jurisdiction over this case. *See* 1a-8a.

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[2] Immediately prior to trial, the Indians attempted to remove the case again, this time citing the All Writs Act. Their theory was that the federal court should take the case away from the Louisiana court because proceeding to trial on the possessory action and entering a judgment of eviction would unduly interfere with the federal courts' exercise of jurisdiction, manifested in its decision that the whole subject should be referred to the primary jurisdiction of the Bureau of Indian Affairs. Despite solid authority that All Writs Act removal jurisdiction exists, the federal court remanded the case a second time, with the indication that nothing had changed since its original ruling.

The Indians timely filed an application for writs of certiorari with the Louisiana Supreme Court, which was denied on December 13, 1996. *See* 9a.

REASON WHY CERTIORARI SHOULD BE GRANTED

The Louisiana courts' exercise of jurisdiction to evict Indians from land that is claimed to be Indian land is contrary to the plain wording of express federal law, numerous federal and state court decisions applying this law, and paves the way for the very abuse that the federal law was designed to prevent.

The issue before the Louisiana courts was whether LL&E is entitled to a declaration that it has the right to possession of the disputed land, that is, whether LL&E is entitled to evict the Indians from that land. Ordinarily, the Louisiana state courts, as the final arbiter of property rights in Louisiana, would be entitled to adjudicate this question. When, however, the defendants to the possessory action responded by asserting their Indian aboriginal title and possessory rights in the land in question, the Louisiana courts could no longer decide the issue, because they had no jurisdiction to resolve the defense raised by the Indians. Under federal law, state courts do not have the power to adjudicate title to land that is alleged or claimed to be Indian land.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168, 93 S.Ct. 1257, 1260, 36 L.Ed.2d 129 (1973). This

history of the relationship between the federal government, state government and Indian tribes makes clear the "federal government's predominance over Indian affairs in general and over Indian land policy in particular." *Boisclair v. Superior Court*, 801 P.2d 305, 309 (Cal. 1990). Public Law 280, now 28 U.S.C. § 1360 and 25 U.S.C. § 1322,[3] is a mandatory grant of jurisdiction to six specific states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) and a permissive grant to all other states, including Louisiana. 28 U.S.C.A. § 1360 (West 1993); 25 U.S.C.A. § 1322 (West 1983). This Court has held that Public Law 280 "required some States to assume, and gave other States . . . the option of assuming" jurisdiction over civil disputes that involve Indians and arise in "Indian country."[4] *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 1992, 124 L.Ed.2d 30 (1993); 28 U.S.C.A. § 1360 (a); 25 U.S.C.A. § 1322(a). Public Law 280 was later amended so that the states not expressly mentioned, which had been given the option to assume such jurisdiction, could only do so with the consent of the Indians. 25 U.S.C.A. § 1322 (a).

Public Law 280, however, limited the mandatory and permissive grants of jurisdiction to the states by expressly

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[3] Other sections of Public Law 280 are codified at 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321-1326. 18 U.S.C.A. § 1162 (West 1984); 25 U.S.C.A. §§ 1321-1326 (West 1983).

[4] "[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and Indian allotments." F. Cohen, *Handbook on Federal Indian Law* 34 (1982 ed.)

reserving to the United States the exclusive power to adjudicate disputes involving title to or possession of Indian land by warning that, "[n]othing in this section. . . . shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, **the ownership or right to possession** of such property **or any interest** therein." 28 U.S.C.A. § 1360 (b); 25 U.S.C.A. § 1322 (b) (emphasis added). Public Law 280 "embod[ies] the principle that the exclusive federal-Indian trust relationship is best maintained by channeling all disputes about such land into federal court." *Boisclair*, 801 P.2d at 311.

Every state and federal court that has confronted the issue of state jurisdiction over a dispute involving land claimed to be Indian land has squarely held that state courts cannot adjudicate the question of whether lands are Indian lands or whether the claimants are not "Indians" for the purposes of resolving the merits of a lawsuit, nor can they adjudicate this question under the guise of deciding their own jurisdiction. *McKay v. Kalyton*, 204 U.S. 458, 469, 27 S.Ct. 346, 350, 51 L.Ed. 566 (1907) (state court does not have subject matter jurisdiction over suit to restrain Indians from interference with possession and use of land allegedly acquired by allotment); *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1305 (9th Cir. 1988) ("[N]on-Indians may not sue an Indian tribe in a state court to obtain rights against Indian property."); *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977), *aff'd* 625 F.2d 330 (9th Cir. 1980) ("Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply"); *State of Alaska v. Agli*, 472 F. Supp. 70, 73 (D.C. Alaska 1979) (State court has no jurisdiction over ejectment suit

because "interests in Indian trust lands are a federal instrumentality" and "state may not adjudicate the dispute nor may its laws apply."); *Alexander v. Cook*, 566 P.2d 846, 848 (N.M. App. 1977) (state courts "lack authority to adjudicate interests in Indian land"); *In re Marriage of Wellman*, 852 P.2d 559, 564 (Mont. 1993) ("On its face [Section 1360] precludes state jurisdiction to adjudicate any interest in Indian trust land," including a claim for valuation of marital property); *Patterson v. Four Rent, Inc.*, 707 P.2d 1147, 1149 (Nev. 1985) (state court does not have jurisdiction to resolve a claim for ejectment against one contending that his rights arise from an Indian allotment of Indian land); *O'Connell v. Hamm*, 267 N.W.2d 839, 842 (S.D. 1978) (state court has no power to "affect title" or to "adjudicate the disposition of" Indian reservation land); *Inland Casino Corp. v. Superior Court*, 10 Cal. Rptr.2d 497, 502 (Cal. App. 1992) (state court lacks jurisdiction to hear foreclosure suit over property that is alleged to be Indian land).

The Louisiana state court did not dispute this basic principle of both Indian and state jurisdiction law that state courts have no jurisdiction to adjudicate title to or possession of Indian lands. On the contrary, the trial court simply dismissed this rule as inapplicable because there is a dispute as to whether the lands at issue are in fact "Indian lands." The court reasoned that because the Indians had not proved their aboriginal title rights to the lands, the lands had not yet been established to be part of "Indian country" and the Indians had not proven themselves to be part of a recognized tribe or "Indians." *See* 12a ("[I]t's the burden of the defendants to prove the status of the land because I think . . . [the federal district

court] was correct in couching [its] ruling on the basis of the fact that there was a lack of established status of either the land or the persons claiming the land, and whereas it may not be critical to the claim of the status of the land that the occupants be a recognized tribe, I think that [its] decision involved both aspects of the defendants' position that its tribal status as well as the status of the land."). Accordingly, the trial court held that it had subject matter jurisdiction to adjudicate LL&E's possessory action, until the federal court ruled that the Indians did indeed own aboriginal title. The Louisiana appellate courts affirmed or refused to review this ruling. *See* 1a, 9a, 21a.

This disposition is in conflict, not only with the express wording of Public Law 280, but with at least two state high court decisions directly on point. Alaska and California have both held that state courts do not lose jurisdiction only after there is a decision that "Indians" or "Indian land" are involved in the dispute before it. Rather, **a state court loses its jurisdiction when a determination as to whether Indian land is involved is required, since only a federal court can decide this question.**

Particularly persuasive is the strong reasoning of the California Supreme Court in *Boisclair, supra*. In that case, the California appellate court, had held that a state court could "provisionally assume jurisdiction" to determine the status of the land as Indian or non-Indian. *Boisclair*, 801 P.2d at 312. In reversing the lower court, the California Supreme Court interpreted 28 U.S.C.A. § 1360, based upon its plain language, purpose and history, as reserving to the federal courts the exclusive power to

adjudicate *all* Indian land disputes, including those in which the question of whether or not the property at issue is in fact Indian land is controverted by the parties:

> [S]ection 1360(b) precludes states from asserting jurisdiction over *disputes* concerning Indian land, including – as here – disputes in which one party claims the disputed property is non-Indian. As will appear, in order for section 1360(b)'s jurisdictional preclusion to operate and its protective purpose to be fulfilled, **the threshold question must be whether one possible outcome of the litigation is the determination that the disputed property is in fact Indian trust land. If that outcome is possible, then a state court is barred from assuming jurisdiction of the case.**
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> * * *
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> **The language plainly supports the position that state court jurisdiction is barred whenever one litigant claims the disputed property is Indian trust land. The statute plainly declares that section 1360(b)'s general grant of civil jurisdiction to the states does not include the jurisdiction "to adjudicate . . . the ownership or right to possession of [Indian] property or any interest therein."** Such language cannot be understood to apply merely to disputes about nonpossession rights to indisputably Indian property, and it does not differentiate between particular types of ownership disputes. The use of the broad term "ownership" signifies **that one class of disputes barred from state court jurisdiction is that in which one side claims that the disputed property is Indian land and the other side claims to the contrary.**

Id. at 312-3 (emphasis added). The California Supreme Court reasoned that to allow a state court to preliminarily determine whether land was Indian land for the purposes of establishing its jurisdiction would result "in certain cases be[ing] erroneously decided in state court, both with respect to the subject matter jurisdiction of the court itself and the merits, by mistakenly denying valid claims of Indian parties." *Id.* at 313. This interpretation of Public Law 280 was unacceptable to the California high court, which concluded that:

> **[a]s long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction.**

Id. at 314 (emphasis added). It matters not whether the necessity for adjudication of alleged Indian rights arises by way of the complaint or by a defense. If an adjudication of a such a claim is required to resolve the case, then the state court has no jurisdiction.

> [W]henever a party claims that the state court has no subject matter jurisdiction under [Public Law 280], it is incumbent on the state court, as in the case of areas of law completely preempted, to look beyond the face of the complaint in order to determine from the totality of the pleadings whether the case before it is a dispute over the "ownership or right to possession [of Indian land] or any interest therein." **If it appears from the pleading that the case may be so characterized, and that one possible outcome of the case may be a finding that the property in dispute is Indian trust land, the**

> **court must dismiss the case for want of subject matter jurisdiction.**

Id. at 315 (emphasis added).

The Alaska Supreme Court had previously reached the same conclusion when it found that state court jurisdiction over a land claim was ousted where the point of contention was whether or not one of the claimants was an Indian, when the outcome of that determination would be used in a determination of title to or possession of Indian lands.

> Subsection 1360(b) precludes state courts from adjudicating the ownership or right to possession of property or an interest therein belonging to an Indian tribe or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States [such as the Non-Intercourse Act]. We must therefore determine whether the resolution of appellant's membership claim involves a determination of rights in restricted or trust property.
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> * * *
>
> A state court adjudication of the question of tribal membership would necessarily encompass issues of ownership or right to possession of property held in trust and subject to restrictions on alienation. The state has no jurisdiction "to adjudicate . . . the ownership or right to possession of such property or any interest therein. 28 U.S.C.A. § 1360(b)."

Ollestead v. Native Village of Tyonek, 560 P.2d 31, 34-36 (Alaska 1977), *cert. denied* 434 U.S. 938, 98 S.Ct. 426, 54 L.Ed.2d 297 (1977).[5]

LL&E will argue, as they did in the Louisiana courts, that these cases are distinguishable because they involved either land that was already recognized as Indian land, or parties who were members of officially recognized Indian tribes. However, these distinctions are specious. First, membership in an officially recognized tribe is absolutely irrelevant to the question of whether aboriginal title

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[5] *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 883 P.2d 136 (N.M. 1994), which no doubt will be cited by LL&E, is not to the contrary. There, the New Mexico Supreme Court held that the New Mexico courts did have jurisdiction to adjudicate a claim to land adjacent to an Indian reservation that had been purchased by the Indian tribe and held by the Tribe in fee simple. In so holding, the Court expressly accepted the "threshold" proposition that Public Law 280's prohibition against state court exercise of jurisdiction applies to controversies involving "trust lands," which the Court found was "not the case here." 883 P.2d at 140. The Court then went on and, in an exhaustive analysis, concluded that the prohibition did not extend to lands that, while held by the Indians and subject to restrictions against alienation under federal law, were not "trust lands," such as those acquired by aboriginal title like the lands at issue in this litigation, but merely lands which the Indians had purchased and acquired just as any other private person acquires lands. Since state courts previously had jurisdiction over title disputes to lands purchased by Indians, Public Law 280 did not divest state courts of the jurisdiction over determination of such lands. *Id.* at 142. As to state court jurisdiction over controversies involving trust lands, the Court expressly stated that the issue "was not briefed or argued in either the Court of Appeals or this Court, and we see no reason to express an opinion on it here." *Id.*

exists.[6] "[T]ribes cannot be neatly divided into 'recognized' and 'unrecognized' tribes for all purposes; rather a tribe may 'exist' for some purposes but not for others" and 'tribe' for aboriginal title purposes includes 'all' tribes. F. Cohen, *Handbook on Federal Indian Law*, at 7-8. *See also Narragansett Tribe of Indians v. Southern R. I. Land Dev. Corp.*, 418 F.Supp. 798, 812 (D.R.I. 1976) (Aboriginal title [reflected, for example, in the Nonintercourse Act] does not "exclude a *bona fide* tribe not otherwise federally recognized . . . Th[e] policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, . . . and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands . . . "). As to recognized Indian lands, this Court has held that "Indian country" is not limited to formal reservations; on the contrary, it encompasses not only informal reservations but also any property held by the United States in trust for Indians, such as lands subject to aboriginal title like the land at issue here. *See Oklahoma Tax Comm. v. Sac & Fox Nation, supra*, 113 S.Ct. at 1991 ("Indian country" was intended "broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."). Accordingly, because "official" recognition of either Indian status or Indian rights to land is utterly irrelevant to whether aboriginal title exists, the distinctions relied

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[6] The Indians have filed a declaratory judgment action seeking recognition of their aboriginal title to these and other lands in Terrebonne Parish, Louisiana, which is currently pending in the Eastern District of Louisiana, docket no. 93-3537, pursuant to the court's federal question jurisdiction.

upon by LL&E to escape from *Boisclair* and *Ollestead* are utterly specious, and do not eliminate the conflict that has erupted between those courts and the Louisiana courts below.

LL&E will also no doubt cite to this Court numerous cases discussing the assertion of state court jurisdiction in a variety of contexts, including claims of child custody, gambling and gaming, criminal law enforcement, and others. They will argue that it would be bad policy to allow a litigant to divest a state court of jurisdiction by simply making a claim of Indian rights, because the state courts should be allowed to adjudicate all of these disputes. However, regardless of the scope of a state's jurisdiction in other contexts, Congress has already determined that adjudication of Indian "ownership or right to possession" to land is to be exclusively federal. 28 U.S.C.A. § 1360; 25 U.S.C.A. § 1322.

This determination by the United States was very wise, as the facts of this case prove. Through a manipulation of the state and federal courts, pitting one against the other, LL&E has secured a judgment evicting persons who claim Indian title to their land. The only forum which can adjudicate and enforce the evicted persons rights to this land is a federal court that has been closed to them at LL&E's urging of primary jurisdiction deferral to the Bureau of Indian Affairs. If the Louisiana court had correctly abstained, one court would have had the jurisdiction to supervise both aspects of this case – LL&E's claim to possessory rights, and the Indians' claim to title. It would not have allowed both to proceed on different tracts which enables LL&E to succeed in its duplicity – rushing to judgment on its possessory rights, but

condemning the Indians' defense to indefinite limbo. It was exactly this same kind of perfidy that Congress sought to avoid when it reserved adjudication of all questions of Indian land title to the federal courts.[7]

The issue raised by this case is writ worthy. Aside from the patent unfairness of what has transpired, the result below cannot survive under any standard of scrutiny. The law cannot be that, despite a federally-protected right to have all questions of Indian title reserved for the federal courts, a defendant can be forced to waive that right merely because a plaintiff claiming state possessory rights brings an action in ejectment in state court. The courts that have most analogously considered the question have all unanimously held that when the issue of Indian title is raised, even if only alleged, the state court immediately loses jurisdiction – federal court jurisdiction over all cases where Indian title is at issue is exclusive. The Louisiana courts' rulings in this case clearly contravene the laws of the United States, are in conflict with the decisions of this Court and those of other states and,

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[7] The Indians tried to remove this case not once, but twice, only to be remanded on both occasions. Quite simply, the federal district court was absolutely wrong when it held that it was bound by the well-pleaded complaint rule to respect LL&E's artful pleading, which pled this case as if it did not involve any question of Indian rights. Federal jurisdiction exists to resolve such questions, *see Oneida*, supra, regardless of whether they are raised by petition or defense, *see Boisclair, supra*. The decisions to remand, even though erroneous, were unassailable. 28 U.S.C.A. § 1447 (d) (West 1994). Unfortunately, these decisions were relied upon by the Louisiana court as part of its rationale in deciding to exercise jurisdiction in this case.

accordingly, have deprived the defendants of their statutorily-provided right to have their claims decided by a federal court. This Court should therefore exercise its judicial discretion under Rule 10, subsections (b) and (c) and grant this petition for writs of certiorari to review the correctness of the Louisiana courts' actions in this case.

Respectfully submitted,

R. Glen Cater
Jennifer Willis
Cater & Willis
3723 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 488-6300

Joseph L. Waitz
Mary W. Riviere
Waitz & Downer
423 Goode Street
Houma, Louisiana 70361
Telephone: (504) 876-0870

Mack E. Barham
Robert E. Arceneaux*
Julia Symon de Kluiver
Barham & Arceneaux
650 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
Telephone: (504) 525-4400

Joel R. Waltzer
Waltzer & Associates
144 Elk Place, Suite 1710
New Orleans, Louisiana 70112
Telephone: (504) 525-1586

Attorneys for Petitioners, Sidney Verdin, et al.

* *Counsel of Record*

STATE OF LOUISIANA

COURT OF APPEAL
FIRST CIRCUIT

NUMBER 95 CA 2579
THE LOUISIANA LAND AND
EXPLORATION COMPANY
VERSUS
SIDNEY VERDIN, ET AL

Judgment Rendered:
September 27, 1996

Appealed from the Seventeenth Judicial District Court
in and for the Parish of Lafourche, Louisiana
Trial Court Number 72,464

Honorable Jerome J. Barbera, III, Judge

Charles D. Marshall, Jr.
New Orleans, LA
and
Donald L. Peltier
Thibodaux, LA

Attorneys for
Plaintiff-Appellee
The Louisiana Land
and Exploration Co.

Joel R. Waltzer
Jennifer N. Willis
Robert E. Arceneuax
New Orleans, LA
and
Joseph L. Waitz
Houma, LA

Attorneys for
Defendants-Appellants
Sidney Verdin and
Wickliff Verdin

Scott D. Wilson
Baton Rouge, LA

Attorney for
Defendant
United Houma Nation

BEFORE: LOTTINGER, C.J., FOIL, AND FOGG, JJ.

FOGG, J.

The salient issue raised on appeal in this possessory action is whether state court has subject matter jurisdiction.

Louisiana Land and Exploration Company (LL&E) filed this possessory action on November 12, 1992, relating to two sections of marshland property (Sections 27 and 28, Township 19 South, Range 20 East) in Lafourche and Terrebonne Parishes and seeking to stop the individual defendants from their alleged acts of trespass and damage on the property. LL&E's petition asserted that since 1926 it had continually exercised corporeal and civil possession of the property.

Although none of the eight individual defendants were living on the property, LL&E's suit sought the removal of various constructions left on the property by defendants Sidney Verdin and Wickliff Verdin. These constructions included two butterfly nets and an adjacent shack. The suit also sought damages for cuts which had been dug into two earthen dams on the property, adjacent to the placement of the butterfly nets.

On September 13, 1993, the defendants removed the case to the United States District Court for the Eastern District of Louisiana. In their removal, the defendants

asserted the same argument they are raising in this appeal, that the federal court had jurisdiction over this matter because the defendants claimed that they were members of an Indian tribe and the property is part of their Indian lands.

The federal court rejected the defendants' argument of federal jurisdiction and ordered this case remanded to state court. Following remand, the defendants, on September 2, 1994, filed an exception of lack of subject matter jurisdiction along with their answer asserting their exception that the state court lacked subject matter jurisdiction because "the lands involved are lands owned by the federal government in trust for the Houma Nation . . . [and] because of the exclusive nature of federal interests associated with relations between the United States and Native Americans."

On July 17, 1995, a hearing was conducted on the defendants' subject matter jurisdiction exception. In support of their motion, the defendants argued their mere assertion of Indian status and/or tribal ownership as defenses in this matter was sufficient to divest the state court of jurisdiction in the case. The district court overruled the subject matter jurisdiction exception.

The defendants filed an Application for Supervisory Writs with this court, seeking to have the judgment of the trial court concerning subject matter jurisdiction overturned. On July 27, 1995, this court acted on the writ application stating: "Writ denied. We find no error."

On July 27, 1995, the defendants again removed the case to federal court asserting that the federal court had exclusive subject matter jurisdiction. In an emergency

hearing the following day, the federal court once again held that it had no subject matter jurisdiction in this proceeding and ordered the case remanded.

The matter was tried in state court on July 31, 1995 and August 1, 1995. The trial court rendered judgment in favor of LL&E and against the defendants, recognizing LL&E's right to possession of the property and ordering Wickliff Verdin to pay LL&E $9,240.00 in damages.

The defendants appeal that judgment asserting solely that the trial court lacked subject matter jurisdiction "over a possessory action filed against a group of persons who claim as a defense their status as an Indian Tribe entitled to aboriginal rights to the property at issue." LL&E contends the issue of subject matter jurisdiction was already decided by this court and is, therefore, law of the case.

The law of the case principle is a discretionary guide which relates to (a) the binding force of a trial judge's ruling during the later stages of trial, (b) the conclusive effects of appellate rulings at trial on remand, and (c) the rule that an appellate court ordinarily will not reconsider its own rulings of law on a subsequent appeal in the same case. **Glenwood Hospital, Inc. v. Louisiana Hospital Service, Inc.**, 419 So. 2d 1269 (La.App. 1 Cir. 1982). It applies to all prior rulings or decisions of an appellate court or the supreme court in the same case, not merely those arising from the full appeal process. **Brumfield v. Dyson**, 418 So. 2d 21 (La.App. 1 Cir.), *writ denied*, 422 So. 2d 162 (La. 1982). Reargument in the same case of a previously decided point will be barred where there is simply a doubt as to the correctness of the earlier ruling. However,

the law of the case principle is not applied in cases of palpable error or where, if the law of the case were applied, manifest injustice would occur. **Glenwood Hospital, Inc. v. Louisiana Hospital Service, Inc.**, 419 So. 2d 1269 (La.App. 1 Cir. 1982).

The reasons for the "law of the case" doctrine is to avoid relitigation of the same issue; to promote consistency of result in the same litigation; and to promote efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. **Day v. Campbell-Grosjean Roofing and Sheet Metal Corp.**, 260 La. 325, 256 So. 2d 105 (1971).

When an appellate court considers arguments made in supervisory writ applications or responses to such applications, the court's disposition on the issue considered usually becomes the law of the case, foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. **Easton v. Chevron Indus., Inc.**, 602 So. 2d 1032 (La.App. 4 Cir.), *writ denied*, 604 So. 2d 1315 (La. 1992). However, where a prior disposition is clearly erroneous and will create a grave injustice, it should be reconsidered. **Dodson v. Community Blood Center of Louisiana, Inc.**, 633 So. 2d 252 (La.App. 1 Cir. 1993), *writ denied*, 93-3158, 93-3174 (La. 3/18/94); 634 So. 2d 850, 851. In the distant case, we find no such error. Therefore, our prior ruling that state court does have subject matter jurisdiction over this matter is law of the case and we will not review this issue on appeal.

In its petition, LL&E sought compensation for damages caused by both Sidney Verdin and Wickliff Verdin.

The trial court found that both of these defendants had damaged LL&E's property, but declined to award compensation to LL&E for the damage caused by Sidney Verdin upon a finding that LL&E had not properly proved the extent of its damages with respect to this defendant. LL&E answered this appeal, seeking compensation for damages Sidney Verdin caused to its property. In its answer to the appeal, LL&E contends that the trial court erred by refusing to allow Kermit Coulon, an LL&E employee, to testify on the costs of having the damage caused by Sidney Verdin repaired. LL&E asserts that it should have been allowed to introduce its lay testimony on expected repair costs because that testimony was based on significant first-hand experience with the same repairs and repair costs at nearby locations.

Generally, a witness not testifying as an expert may not give testimony in the form of opinions or inferences. This rule is subject to the limited exception of Louisiana Code of Evidence article 701 which provides that a lay witness may provide testimony in the form of opinions or inferences where those opinions or inferences are: (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

In this case, Coulon has been employed by LL&E for fourteen years; in 1992 he became manager of the Houma office. As such, his responsibilities were to oversee all activities on LL&E's property. Coulon testified that, in the summer of 1992, he observed structures on two sites in Sections 27 and 28 of the property which were unauthorized. At one site, there was a butterfly net with a creosote piling across a breach in the earthen plug and a

small camp. At the second site, there was a small wooden platform, an earthen plug on a location canal, a butterfly net, and a large creosote piling across the breach in the location canal. LL&E considered the circumstances of the second site to constitute a navigational hazard which required immediate action. Therefore, LL&E removed the piling, platform and net. It hired a contractor, Plaisaince Dragline and Dredging Company, to re-plug the dam. The cost of the contractor and the removal of the structure was $6,240.00. Subsequently, the contractor returned to the site to add soil to complete the process of plugging the dam at a cost of $3,000.00.

Coulon testified that the physical characteristics of both sites were basically the same and the material required to restore the sites would be the same. LL&E asserts that this testimony is admissible as, throughout his employment with LL&E, Coulon has dealt with repairing breaches and earthen plugs and installing earthen plugs. Additionally, he is responsible for the costs and expenses incurred in such an operation.

We find that both elements of Article 701 are present in this case. First, Coulon's testimony is rationally based on his perception. His experience and background over a period of fourteen years is reflected in his testimony describing his personal observations. Additionally, he personally handled the repair of the site two, a virtually identical site.

Once the trial court made the factual determination that Sidney Verdin was responsible for the cut at the first site, the only remaining factual issue was the assessment of damages. Coulon's extensive background with this

type of repairs, his extensive knowledge of the two sites and his knowledge of the cost of repairing site two are certainly helpful in the determination of this factual issue. Therefore, we find the trial court abused its discretion in disallowing the "lay opinion" of Coulon. We will amend the judgment of the trial court to order Sidney Verdin to pay LL&E $9,240.00 for damages he caused to their property.

For the foregoing reasons, the judgment of the trial court is amended to include an award of $9,240.00 in favor of LL&E and against Sidney Verdin. In all other respects, the judgment of the trial court is affirmed. Costs are assessed against defendants.

AMENDED AND, AS AMENDED, AFFIRMED.

THE SUPREME COURT OF THE STATE OF LOUISIANA

LOUISIANA LAND AND EXPLORATION COMPANY

vs. NO. 96-C-2629

SIDNEY VERDIN, ET AL

IN RE: Verdin, Sidney; Verdin, Wickliff; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Lafourche 17th Judicial District Court Div. "B" Number 72,464; to the Court of Appeal, First Circuit, Number CA95 2579

December 13, 1996

Denied.

BJJ

PFC

WFM

JCW

HTL

CDK

EJB

VICTORY, J. not on panel.

Supreme Court of Louisiana
December 13, 1996

/s/ John Tarlton Olivier
Clerk of Court
For the Court

THE LOUISIANA LAND AND EXPLORATION COMPANY	17TH JUDICIAL DISTRICT COURT
VERSUS NUMBER 72464	PARISH OF LAFOURCHE
SIDNEY VERDIN, ET AL.	STATE OF LOUISIANA

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Transcript of the ***COURT'S ORAL REASONS FOR JUDGMENT REGARDING THE DEFENDANTS' EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION*** held in the above numbered and entitled matter on the 17th day of July, 1995, at Thibodaux, Louisiana, before Honorable Jerome J. Barbera III.

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APPEARANCES

Robert E. Arceneaux, Esquire,
Mary W. Riviere, Esquire,
representing the Defendants.

Charles D. Marshall, Jr., Esquire,
David N. Schell, Jr., Esquire,
Donald L. Peltier, Esquire,
representing the Plaintiff.

[p. 2] THE COURT:

I'm going to deny the exception because I believe that the issue raised as to the status of the land is the burden of the defendant to show rather than the burden of the plaintiff to show. I don't think it's the plaintiff's burden in this case to disprove the status of the lands. I

think rather it's the burden of the defendants to prove the status of the land, because I think that – I'm not saying that I agree with everything that Judge Berrigan says because most of what she talks about in here are things that are foreign to me – but I think that she was correct in couching part of her ruling on the basis of the fact that there was a lack of established status of either the land or the persons claiming the land, and whereas it may not be critical to the claim of the status of the land that the occupants be a recognized tribe, I think that her decision involved both aspects of the defendants' position that it's tribal status as well as the status of the land and I think for those reasons and for other reasons given at the end of the brief filed by LL&E in this case that the exception should be denied and that this Court does, in fact, have jurisdiction.

So, Mr. Marshall, there is no reason for the letter, on this exception, to be introduced into evidence. I'm saying – I'm [p. 3] not saying that it might not come if its [sic], you know, proper foundation is given and whatever.

MR. MARSHALL:

Your Honor, might I just proffer the letter, depending on what might be done with your judgment in this matter.

THE COURT:

On the exception?

MR. MARSHALL:

Yes, sir.

MR. ARCENEAUX:

That would be wise because we will appeal.

THE COURT:

You could do that.

MR. MARSHALL:

Thank you.

THE COURT:

Let it be marked as *LL&E Proffer Number-1 on the exception.*

MR. ARCENEAUX:

Your Honor, I'm not sure I need to do this because I do believe the First Circuit Court of Appeal can take judicial notice, but since I do have a need to make the record complete, could I ask Your Honor's indulgence to allow me to include in the record Judge Berrigan's ruling that I referred to wherein she found in denying LL&E's 12V6 (phonic) motion that the Bureau of Indian Affairs has no jurisdiction to resolve a question of whether or not the property at issue is trust land, [p. 4] and I just want to do that just to be safe at the First –

THE COURT:

At the Bureau of Indian Affairs?

MR. ARCENEAUX:

The Bureau of Indian Affairs. The other part of this letter. The other side to the letter. And I realize, Mr. Marshall, –

MR. MARSHALL:

That's not what her ruling was addressed in the matter.

MR. ARCENEAUX:

I realize – I realize –

MR. MARSHALL:

I mean, I don't – you can read it and make your decision if you'd like, but that's not what it was addressed to.

MR. ARCENEAUX:

Charlie, he's already made his decision and I realize that you disagree with me about what her ruling is. I'd like to let the First Circuit read her ruling and decide for itself what it means.

So, I'd just like to include it in the record.

MR. MARSHALL:

We haven't briefed it, Your Honor, and we haven't discussed it with you and I'd just object to it.

MR. ARCENEAUX:

It will be briefed before the First Circuit Court of Appeal.

[p. 5] THE COURT:

Your request is denied. Your request is denied.

MR. ARCENEAUX:

Then I will proffer it as a proffer number two.

THE COURT:

Well, it will be your proffer number one.

The *Defendants' Proffer Number-1.*

MR. ARCENEAUX:

All right. At this time I would also like to give Your Honor notice of our intent –

THE COURT:

I don't have it.

MR. ARCENEAUX:

I will give you a copy in just a second.

THE COURT:

OK.

MR. ARCENEAUX:

I would like to give Your Honor notice of our intention to apply to the First Circuit for writs and ask for a leave of five days to do so.

THE COURT:

All right. When is the trial?

MR. MARSHALL:

Trial is the 31st, Your Honor.

MR. ARCENEAUX:

I would also request that Your Honor stay all proceedings pending the First Circuit's ruling.

MR. MARSHALL:

[p. 6] We would object to that, Your Honor.

THE COURT:

Denied. Ask the First Circuit –

MR. ARCENEAUX:

We will. We will.

THE COURT:

– when you submit your application for a stay. They can decide if they want to do that because it's unlikely that they will respond to your writ.

MR. ARCENEAUX:

Within the time limit.

THE COURT:

Within the time – although, you never know. Every now and then they surprise me, you know.

(Colloquy.)

MR. ARCENEAUX:

I also, just for the purpose of making things complete, would also give notice of our intention to apply to Your Honor's ruling denying our continuance of two weeks ago and ask the writs will be filed in the same application, also five days.

THE COURT:

Continuance?

MR. ARCENEAUX:

Remember, we had asked for a continuance and Your Honor also denied that.

THE COURT:

Continuance of the trial?

MR. ARCENEAUX:

[p. 7] Of the trial, yes. So we will be taking writs on both of those issues.

THE COURT:

What was the – I don't even remember –

MR. ARCENEAUX:

The basis of the continuance was that the trial date had been fixed before one of the defendant's answers had been filed.

MR SCHELL:

Your honor, I believe Mary Riviere, who represents that one defendant, –

THE COURT:

We resolved all of that.

MR. SCHELL:

– admitted that was inadvertence only and agreed to provide an answer which she did. So unless she's now saying that it wasn't inadvertence and it was all a scheme to get a continuance at the last minute.

THE COURT:

Well.

MR. ARCENEAUX:

That's an issue for me to resolve before the First Circuit. I'll simply give you notice about it.

THE COURT:

But, Mr. Arceneaux, you can't come in here and –

MR. SCHELL:

You're not representing –

THE COURT:

Wait, wait, wait, wait.

[p. 8] You can't come in here now, and I mean, I know what Ms. Riviere said on the record, and what she said on the record was just what counsel said she said. Now, if you're going to come in here now and say that – I mean, you may not like what she said, but it's done.

MR. ARCENEAUX:

No. I'm fully aware of what she said and I understand it but –

THE COURT:

So, I think –

MR. ARCENEAUX:

– the issue – may I explain the issue I want to raise, Your Honor. Perhaps you'll understand.

THE COURT:

No. No. I mean, you can do whatever you want to do with that with the First Circuit. But I think if you raise that issue with the First Circuit, I think you're going to expose yourself to severe criticism. But that's your business. However you want to practice law is your business.

OK. Mr. Marshall, prepare a judgment reflecting a ruling of the Court.

MR. MARSHALL:

I will, Your Honor. Thank you, Your Honor.

THE COURT:

All right. Thank you, gentlemen.

MR. ARCENEAUX:

Thank you very much, Judge.

[p. 9] THE COURT:

All right. I appreciate your hard work.

CERTIFICATE

I, Shirley M. Buckel, Official Court Reporter, in and for the Seventeenth Judicial District Court, Parish of Lafourche, State of Louisiana, do hereby certify that the above nine (9) pages constitutes a true and faithful transcript, to the best of my ability and understanding, of the proceedings held at Thibodaux, Louisiana, on July 17, 1995, in the matter numbered and entitled:

THE LOUISIANA LAND AND
EXPLORATION COMPANY
VERSUS NUMBER 72464
SIDNEY VERDIN, ET AL.

In Faith Whereof, witness my signature this 18th day of July, 1995.

/s/ Shirley M. Buckel
SHIRLEY M. BUCKEL,
CERT. #87244
17TH JUDICIAL
DISTRICT COURT
DIVISION "B"

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

LOUISIANA LAND AND EXPLORATION COMPANY — NO. 95 CW 1489

VERSUS

SIDNEY VERDIN, ET AL — JULY 27, 1995

In re: Sidney Verdin, et al, applying for supervisory writs, 17th Judicial District Court, Parish of Lafourche, No. 72, 464-B.

WRIT DENIED. We find no error.

RHP
KJF
FP

COURT OF APPEAL, FIRST CIRCUIT

/s/ Karen West
DEPUTY CLERK OF COURT
FOR THE COURT

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto;

or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may posses [sic] shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1322 Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil cuases [sic] of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian

country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may posses [sic] shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.